

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

ROGER ARMANDO MIDENCE

§

v.

§

CIVIL ACTION NO. 5:06cv66

BRIAN K. SMITH, ET AL.

§

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
ON THE DEFENDANT DAVID MOORE

The Plaintiff Roger Midence, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Midence complained of an altercation on July 18, 2005, in which he was allegedly assaulted by correctional officers Brian Smith, Brian Simmons, Scott Godwin, Mark Harbison, Wesley Roseberry, and David Coleman. Following this incident, he says, Sgt. Michael Crow attempted to cover it up. Midence also complains that David Moore, a physician's assistant, was deliberately indifferent to his serious medical needs.

All of the Defendants except for Moore have filed motions for summary judgment, which motions include copies of Midence's medical records. After review of Midence's pleadings and these medical records, the Magistrate Judge issued a Report on May 17, 2007, recommending that Midence's claims against Moore be dismissed as frivolous. Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995) (noting that medical records of sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference to serious medical needs). Midence received a copy of this Report on June 7, 2007, but filed no objections thereto; accordingly,

he is barred from *de novo* review by the district judge of the findings, conclusions, and recommendations contained in the Report, and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the Report of the Magistrate Judge as well as the pleadings and records in the case. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 49) is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the Plaintiff's claims against the Defendant David Moore are hereby DISMISSED with prejudice as frivolous. 28 U.S.C. §1915A(b). It is further

ORDERED that David Moore is hereby DISMISSED as a party to this lawsuit. Finally, it is

ORDERED that the dismissal of these claims and of this party shall not count as a strike for purposes of 28 U.S.C. §1915(g).

SIGNED this 7th day of August, 2007.



T. JOHN WARD
UNITED STATES DISTRICT JUDGE